THREE LETTERS

to a Connecticut Editor
on the proposed

LEAGUE OF NATIONS

(Reprinted February, 1920)

By

SELDEN BACON
of the New York Bar

Written in answer to an article by
MR. HORACE D. TAFT

Shall not the guilty be punished?

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LEAGUE FOR THE PRESERVATION OF
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By SELDEN BACON
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Written in answer to an article by Mr. Horace D. Taft

I—ITS INEFFICIENCY

New York, April 14th, 1919

Sir:—

It has been characteristic of those arguing in support of the so-called League of Nations that they like to carry on their discussions in misty words and phrases, large-sounding and of indefinite meaning. This characteristic has not been confined to their arguments, but has entered into the document itself that was presented last February. Its phrases are high-sounding. But they are, beyond those of almost any similar document, ambiguous and ill-defined. Even the term League of Nations is one of those indefinite terms which may cover anything from a defensive alliance up to a confederation as close, at least, as that of the original thirteen states, of 1777, which was abandoned 10 years later as utterly vain and futile to create the "more perfect union" of the constitution.

The document itself that is presented is not more clear. Does, or does it not, establish a super-government? I find that simple question difficult to answer.

It seems to me to depend very largely on what effective construction is in the future given to the ambiguous provisions of the instrument. The creation of permanent bodies, executive council and body of delegates, of a permanent secretariat and at least one permanent bureau, looks like a government about like that of a New York county, but one without accurately defined powers or limitations thereon. The lack of provision for a taxing power looks the other way. What all this might be made into by a new Bismarck or Napoleon, grasping at power, sitting in a council untrammeled by any limitations on its broad jurisdiction to interfere in any way "that may be (by it) deemed wise and effectual to safeguard the peace of nations" and to bring about "fair and humane conditions of labor" and "equitable treatment for commerce," it is impossible to foretell.

To those to whom such unrestricted powers seem not to be fraught with danger I commend a study of the extent to which our federal legislation of the last forty years has been based on the modest looking words in the federal constitution, "Commerce . . . among the several states."

If the instrument does provide for a super-government, it is one of general powers as to these subjects, unrestrained by any checks or limitations, or by any bill of rights. To assume that it provides for such a super-state without providing such restrictions and checks, is to condemn the entire proposition irretrievably. One of the features in which the document might well be amended is by incorporating a clear and

definite statement in unambiguous terms that no super-state is intended.

Let us assume, with the friends of this new document, that it does not create a super-state. And on getting rid of that idea, let us also get rid of the high-sounding misty word "League," and use a more exact term which will exclude the super-state idea, namely: "Treaty." That is all the instrument is, if it does not create a super-state.

Now, what is a treaty if the creation of a super-state be not one of its terms? It is simply a contract between nations or governments, sovereign powers, "high-contracting parties" as we term them.

Now there are certain principles applicable to all contracts, with which lawyers have grown rather familiar, and which I may not stop to prove:

1. A contract isn't any stronger than the law which gives it recognition.

2. The law, which gives it recognition, isn't any stronger than the remedy it affords in case of a breach.

3. That remedy isn't any stronger than the power back of it that enforces that remedy.

I may briefly illustrate these propositions:

1. If you have a contract that for some reason the law will not recognize, as a contract with a child or an insane person to sell you his valuable estate for a pittance, it doesn't amount to much as a contract. It is a void contract.

2. If you hold a promissory note of a man and the only remedy the law gives you is judgment and execution against

his property, and if he hasn't any property and isn't likely to get any, the fact that the contract to pay is valid in law, doesn't practically help you much when the remedy it offers is nothing.

3. If the law is with you and the court has given you judgment, but the debtor refuses to obey the court, and for some reason the court cannot coerce him into obeying its decree, the facts that you are entitled to the relief you sought, that the law gives it to you, that the court has awarded it to you, that the other man has the wherewithal to meet your demand, do not help you much, if there isn't the power, back of the court's decree, that enables the court to put it in force.

In ordinary matters we are so accustomed, in this country and in these days, to seeing the courts' decrees obeyed, without bringing the power that lies back of them into active play, that most of us are apt to forget that after all it is that power, that superior physical force, which lies back of the court's decree, that is the real vital thing in law and in government. Government, in reality, is nothing but the organized physical force of the community. That force may be guided and directed by brains, but, at the bottom, government rests on physical force.

That remedy enforcible by a superior power, outside and superior to any party to the agreement, which lies back of the contract, we lawyers call the "sanction." Without the sanction neither contract nor law amounts to anything. And the great trouble with treaties, with Leagues of Nations and covenants of nations, always has been, and is to-

day, and is going to continue to be, the lack of a sanction.

No one should appreciate that so well as Americans, and, of all Americans, none better than the people of Connecticut, who, 135 years ago, were brought up squarely against the utter futility and powerlessness, of the best League of Nations that was ever devised, to prevent war among its own members.

Mr. Taft says my argument is against a League of Nations. In a sense that is true. I am against a *mere* League of Nations, because of its futility and powerlessness to accomplish what is wanted.

I am against the kind of a "League of Nations" that cannot give what we hope for, that calls on us to put our own freedom and liberties at risk, for the chance that, perhaps, a promise without a sanction, without any real law back of it, without any court to award judgment if there were a law, and without any sheriff to carry out the judgment if there were one, may yet suffice to restrain the powerful, the ambitious, the greedy and the lawless among the rulers of the world, so that the rest of us may disarm, leaving ourselves an easy prey, should the Hunnish spirit ever rise again anywhere.

Unless human nature has changed, that spirit will rise again. Many of us have reason to believe that it only slumbers for the moment in a Germany which, owing to the armistice of last November, already talks of "our unbeaten armies" and of a new war after a few years. Mr. Taft thinks the horror of this war has changed human nature. Does he think the nations have

suffered from these four and a half years more than Europe suffered from the Thirty Years' War, or from the wars of Louis XIV, or from the Napoleonic wars, or that the nations are more war-weary to-day than they were after any one of those great struggles? I do not. And I believe that as surely as Napoleon followed a century after Louis XIV, and Wilhelm followed a century after Napoleon, a new ruler of lawless ambition will follow somewhere in the future, unless some real restraint stronger than any mere treaty or mere League of Nations is devised.

I stand on three propositions:

First: The proposed "League of Nations" is without a sanction, and is futile, unable to accomplish the desired result; a fair weather affair; a wooden gun looking very formidable when you don't need it, and worthless and a mere danger when you do.

Second: The league would involve us in enormous risks and hazards, to which we should put ourselves only if convinced that the benefits to be gained were great and sure, and only when all the risks to be incurred had been reduced to the lowest possible limit, and guarded against to the highest possible extent, and when we are certain that the results desired cannot otherwise be attained. And under this head I stand against any provision that is of the nature of the "entangling" alliances that Jefferson dreaded or shares in the objectionable features of the permanent alliances that Washington and Hamilton so feared, if the "entangling" features can, by any possibility, be avoided. And I note that they did not

warn against all alliances but only against those having those dangerous features; and that advice is as sound to-day as it was then. The trouble is Mr. Taft has forgotten to consider that the word "entangling" was no mere idle epithet, supposed to apply to every alliance, but the real center and pivot of the advice. And I believe that the proposed document is of that very character, "entangling us in unknown disputes of the future, requiring us perhaps, some day, to take part on a side that may seem to us wrong and unjust. I do not believe in signing blank checks.

Third: I believe it can be shown that something bigger and better than the proposed "league," that will not put our liberties to any such terrible risks, that will not "entangle" us to any such extent, that will really produce the results we all seek, that will be powerful and binding under the strains and stresses which leagues and treaties give way under, can be devised, something carrying within itself the sanction, the lack of which is the fatal weakness of the League that Mr. Taft advocates.

1. The proposed League of Nations is insufficient to accomplish the desired result.

Of all Leagues of Nations, that which had the greatest chance of success was the old American Confederation of 1777. It was a league into which the thirteen States of homogeneous populations, of like liberties, laws and institutions were pressed by the outside pressure of the stress of the War of Independence and the common danger to all. The moment that outside pressure was relieved the barrel began to fall

apart; the hoops of the league, the old articles of confederation, were seen to be perfectly powerless to hold the States together. The Continental Congress was a jest and a by-word. When but seven were needed for a quorum, for weeks and months it was impossible to get one. The paper money that had been issued by the United States was almost valueless. It could not pay its bills. It could not collect its dues. And that was a league between states of largely homogeneous populations, which had closely similar laws and institutions, and citizens alike trained in that sturdy respect for law, for justice, for equality, and for the individual rights of others that has always been the fundamental characteristic of the Anglo-Saxon, despite all his other forbidding and unlovable traits. No conditions ever existed so favorable to a league. No better instrument of the kind was ever drawn. And yet within three years after the declaration of peace with England, Connecticut and Pennsylvania, though separated from each other by New Jersey and New York, were on the very verge of open declaration of war. and their respective citizens engaged in actual warfare which the Confederation was utterly powerless to prevent.

The Federalist is Hamilton's argument which convinced our fathers that any mere League of Nations was futile and powerless to prevent wars between the States, or prevent the necessity of each State's maintaining its own standing army. About half the Federalist is devoted to the first proposition, that the powerlessness and futility of the old confederation was an inherent and nec-

essary weakness of any mere League of Nations; and that, therefore, it was necessary to make "a more perfect union," for which the genius of Hamilton discovered and provided a "sanction" in the double allegiance of each individual citizen to State and to Nation, and the power of the government of the union to tax and impose laws upon the individual citizen as a citizen of the United States, regardless of the government of his individual State. In the Nation, composed of all citizens of all the States, Hamilton found the outside superior power, which imposed its sanction on every covenant entered into by any State, which sanction, when the test came, stood the test of four years of bloody war and emerged victorious, a power superior as well to the great States of Virginia and Pennsylvania as to tiny Rhode Island and Delaware.

I may not here repeat Hamilton's arguments which, backed up by the conditions all around them which stared our fathers in the face, proved so convincing. They can be found in the Federalist, and the conditions which verified his every contention are detailed, in a popular way, in Fiske's Critical Period of American History and more fully in McMaster's History.

Hamilton showed that every League of Nations ever devised had gone to wreck for the same reason and because of the same defect, the lack of any sanction to compel any of the leagued states to perform its part when the time of stress came. The list which was long in his day has grown in ours. The guaranty of the neutrality of Belgium was a treaty as binding as words could make it. It was a League of Nations, and

when the time of stress came it was disregarded as "a scrap of paper," because it had no sanction of real international law behind it, but only that flabby mass of moral (or at times immoral) sentiment which has hitherto passed under the misnomer of Public International Law. Misnomer beeause it has had no force of law, no sanction behind it.

I have no doubt that when this war, and the Bolshevik movement that is following in its train, as similar movements have commonly followed great wars, is definitely brought to an end, there will not be another movement toward an outbreak of a great war for many years. Just so long the proposed League of Nations might sail on pluming itself on its success. But let the war-like passions of ambition and greed come into play again, and whether they be sovereigns or peoples, makers of the league would proceed on their way to war regardless of this new "scrap of paper" with no real sanction behind it.

The barriers might look great and strong as long as they were not needed, but let the stress come, and these cardboard barriers, without a sanction to support them, will be swept away in a twinkling.

Great reliance is placed by Mr. Taft, as well as by those who propose the document, on Article VI as providing an effective sanction. I can see plenty of dangers in that article, dangers of stirring up wars, but I can find in it no adequate restraints on great powers, however serious the restraints there provided might be to small ones. If the United States grew recalcitrant over some provisions concerning commerce

and transportation, and got to loggerheads with other powers, how long would the European nations maintain an efficient prohibition of intercourse with us that would shut off their own food supplies? A sanction that binds the little but is powerless against the great is tyrannical. It is the denial of that fundamental principle of our law, never voiced better than by Charles Sumner:

"Equality of rights is the first of rights."

And Germany is not the only great power that has in modern times found it convenient to disregard or "denounce" treaty obligations which were without a sanction. Even the United States has not been guiltless in this regard.

Even the Great Lakes treaty, to which Mr. Taft refers as so valuable an example, was "denounced," that is, declared no longer binding, by President Lincoln, though his action was disavowed by the Senate in one of the great struggles over the respective powers of Senate and President, and Mr. Lincoln withdrew his notice of denunciation.

I do not believe that Hamilton's solution is wholly available for the present situation. The nations have no such common heritage as had the old thirteen, of common history, common institutions and laws, peoples trained to self-government, inheritors of a common liberty and law. But, somewhere, we must find a solution, or the League of Nations will be but one more of the flimsy similar barks fit for summer seas,

that have gone to pieces under the first blast of the storm.

I desire to advert for one moment to the suggestion that those who oppose this proposed league are in the position of Patrick Henry, and its advocates in that of Hamilton, Madison, Marshall and Washington. The precise contrary is the case. Patrick Henry was a flamboyant orator, supporting vociferously a league that had no real binding force, without a sanction. He indulged in misty words, of a type not very different from those of a most prominent supporter of the present proposed league.

But, for the cold hard sense of Washington, Franklin, Hamilton, Marshall, Pelatiah Webster, Madison, Jay, Ellsworth, Sherman and the rest, who believed in "a more perfect union," with real sanctions, with powers strictly bounded and delimited, lest our liberties be endangered, Patrick Henry had nothing but windy oratory and contumely. Fortunate it is for us that the makers of the constitution brought to their task the utmost of hard commonsense, the prudence that took no step blindly but made them go forward into the unknown only the one step which they could clearly see was necessary, and which they justly believed would accomplish the result they sought, at the same time hedging about to the utmost that one step they took, and not blindly rushing into the unknown, conferring indefinite and unlimited powers, without safeguards. It marks the greatness of the Constitution that all its provisions, save those for direct relations between nation and individual

citizen, were old and tested, and the new powers hedged about with strictest limitations.

If we can, let us emulate our fathers who gave us a constitution that has been the wonder and delight of statesmen and lawyers for its clear and exact statements, and for the wonderful efficiency of its powers, which were nevertheless so delimited and held in check by familiar and ancient devices, tried and tested, that our liberties have been by it sustained and strengthened instead of threatened or overthrown.

II—UNNECESSARY RISKS AND HAZARDS

(NOTE: A part of this second letter has been slightly rephrased to make it applicable to the changed phrases of the revised "covenant", which was published a week after the letter was originally written.)

In my preceding letter I discussed certain indications that the golden dreams about a League of Nations have nothing of substance back of them to guarantee their coming true. Unless human nature has suddenly and radically changed in the last five years this league would have precisely the same fate as every league, based on similar propositions, has had for the past three or four thousand years. Mr. Taft is willing to venture much on the assumption that human nature has so changed in that brief period. I do not believe that it has; and, if it had, I ask, would it not change back again in the course of the next twenty years, when the present feeling of horror at the cruelties of war has somewhat dulled?

Now that the league has been amended by providing that anybody can get out on two years' notice, how much of a "league" have we left?

My next proposition is, that in going into this proposed League of Nations the United States would involve itself in enormous risks and hazards.

Senator Lodge, Senator Knox, ex-Senator Root and many others have been pointing out obligation after obligation we assume, while nothing is offered us in return but guaranties of protection of our boundaries from foreign aggression, guaranties that we do not want and do not need, and which,

if we ever did really need them, would be valueless, and much more apt to be a source of oppression than a source of protection.

How, if the league doesn't bind others, is it going to bind us? There are people who believe in keeping their word and carrying out a contract, though void under the Statute of Frauds, even if no court will enforce it. And I trust Uncle Sam will increasingly belong to that class, though we must admit even Uncle Sam hasn't always stood up to his promises. There are perhaps other nations not greatly affected by such scruples.

Between the nations which do have such scruples you need no such "league." No "league" brought us into this war. The law-abiding temper of England and the United States has kept the peace unbroken for over a century despite cases of friction that would have sent Germany and France into war with each other over and over again—the Texan dispute, the Trent affair, the Alabama claims, the Venezuela dispute, the Seal fisheries, the Canadian boundary, the Alaskan boundary.

It is to law-abiding temper that we must look for any future immunity from wars.

If ever Germany becomes a member of the league, how long will this new "scrap of paper" hold Germany after she gets ready to strike again, this time for both world-power and revenge? And they already are talking of it. And, if Germany does not become a member, isn't your disarmament clause a mere snare to catch the other nations?

Are Wilson, House, Gregory and Lansing entitled to feel so confident that they can be more astute in securing permanent Prussian disarmament than Napoleon proved to be? Clemenceau shares no such dream. He sees the danger. He has lived under the threat of that avalanche. He has no faith in a new "scrap of paper" as a substitute for self-defense. If disarmament cannot be safely had what becomes of the enormous dangers of being unarmed?

Does not a disarmament agreement expose the peaceable to the rainbow dreams of benefits of the "league"? The morning cables bring the answer: It has been found necessary to agree to an alliance between England, France and the United States, to defend France against attack by Germany, because the league is not going to be sufficient protection.

I may not take space to discuss objections that are being ably and amply discussed by others, objections to provision after provision calling on us to interfere in matters that are no concern of ours. Aside from calling attention to the list of objections framed by the League for the Preservation of American Independence to the original draft which in great measure apply to the revised articles, I may only stop to make two or three points that I have not seen fully discussed elsewhere.

Mr. Taft thinks the advice against "permanent alliances" or "entangling alliances" obsolete. Usually the legatee attacked by the get-rich-quick artist starts off with the proposition that the lawyer who advises against the scheme is preaching "old fogy" doctrines.

There isn't much difference between "permanent alliances" and "entangling alliances." The feature which makes them objectionable is common to both. It is the undertaking to adopt a specific line of conduct under specified circumstances. This leaves you helpless, unless you break your word, if other unforeseen circumstances have arisen, which make the thing, which you blindly agreed to do, an outrage on your own moral sense, and just the thing you never would have agreed to do. If the alliance be permanent such a situation is, in time, almost certain to arise. If it does arise the alliance "entangles."

Does the United States want to get itself into any such position as that in which Italy found herself in 1914-1915? Italy made the best, perhaps, of a bad situation, though her attitude had something to it of bargaining. But she found herself in an entangling alliance. That was fairly recent. And the advice may not be so out of date.

And right here I would point out that the Entente, without precise contractual obligations, operating only according to human nature and justice, proved a far stronger bond that the Triple Alliance, again demonstrating the futility of any paper "League of Nations." Law, justice and right are stronger bonds than paper treaties.

Let us still beware, then, of permanent or entangling alliances. Such situations are just as awkward and just as unwise to-day as they ever were.

In making a contract it is very unwise to use words whose meaning is ill-defined, loose or vague. The drafters of the "league" were either unfamiliar

with this familiar rule governing the drafting of contracts, or carefully disregarded it. The arguments in favor of the league partake of this same character. There is a great deal about the horrors of war and the blessings of peace. Take that out of their speeches and what is there left? Nothing but a lot of indefinite talk about glittering generalities, no word about practical results in practical situations.

Let us see how this thing might work in a quite possible situation. The United States, we will suppose, enters such a league and agrees to limit its armaments, naval and military. The long-smouldering disputes between Chile and Peru and Bolivia suddenly flame into an invasion, and, to carry out its guaranty, the United States, averse to seeing European forces in South America, sends about all its available naval and military armament to South America. Mexico, then, perhaps stirred up by some wily diplomat near Potsdam, attacks the United States. (Will any one dare to say this is an impossible conception?) The disarmament limitations forbid our raising additional troops; if we raise them we throw the league overboard. Japan, then, or Germany, if she later becomes a member of the League, *to carry out her guaranty of "our boundaries,"* sends over a few divisions to defend us from Mexican invasion, while our own troops are down in the Andes. How do we like the situation? Isn't it what we agreed to? Isn't it written in the bond? And will it help things that the same wily diplomat who stirred up Mexico had perhaps previously secretly stirred up Peru to attack Chile, appreciating

that the United States would vigorously object to seeing European troops in South America, and send its own treaty-limited armament down there?

In 1876, the Jesse James band, well mounted, suddenly appeared in a little Minnesota town, and while half the band tried to rob the local bank, the other half rode around outside, shooting at every citizen who showed his head, a policy usually resulting in terrorizing the community and a successful getaway with a rich haul. Police? What did that bandit array care about the little police force of a country town? But little Northfield possessed a simple, quiet, law-abiding citizen, entirely peaceable, but yet no "pacifist." Anselm R. Manning knelt down in the open street, with Jesse James shooting at him from less than 100 feet away, and picked off horse after horse and rider after rider of the band, till the James boys, the Younger brothers and the rest fled from a community that would defend itself. No similar raid has since been made in Minnesota.

The occurrence carries a lesson that is worth taking to heart.

Has not a community that will defend itself when necessary a protection far more efficient than one that relies on some one else, or on some police force, or some scrap of paper to do it, and forswears defending itself even if attacked? I am no less a good citizen because I will fight to defend my home against a burglar.

The pacifist sees no distinction. All fighting is to him alike bad. The pacifists at The Hague a few years ago played directly into the hands of the

German militarists, when they made it an offense against the laws of war for a civilian not in uniform to fight to defend his own home against an invading army. The German defends his Belgian atrocities under that clause. That provision, put out under the guise of "humanity," is one of the most atrocious things ever devised. It was an attack on the fundamental right of the freeman to carry arms. It was the denial of the right of the free citizen to protect his own family and his own hearthstone from murder, rape and arson, while giving protection to the perpetrators of such crimes if acting under the uniform of a predatory invading sovereign.

Is the United States, under another pacifistic pretense, going to undertake that it will not "provide for the common defense," though that is recited in the preamble of our Constitution as one of its prime purposes?

Is a treaty binding the United States not "to provide for the common defense," within the constitutional powers of President and Senate?

A pacifist Congress may abstain from providing for the common defense, but may it bind this nation so to abstain? I prefer to belong to a nation that is not "too proud to fight" for its own defense or its own honor. I believe in the old law of freedom that made it not only the privilege, but the legal duty of every citizen to carry arms and keep them in order, that he might defend both his own lawful liberties and the State, against all aggression.

That is the law and basis of freedom, of courage, of self-restraint, of every

manly virtue. The principle of a disarmed people, powerless, to be sure, for wrongful aggression, but equally powerless for rightful defense, is the principle of a people ready for oppression and slavery, fit tools to help to oppress others at the behest of any leader who leaps into power.

Is the constitutional prohibition of any restriction of the right of the people to carry arms any less sound in principle than it was 140 years ago? I would rather see wars and have our country produce manly, courageous men to fight them, free, able to demand and maintain their equal rights under the law, than have peace with no men but those too proud, too weak, too unmanly to fight.

I would rather be a French soldier, muddied, starving in the trenches, or among the wounded, impoverished, with kindred murdered, my home destroyed, but still fighting on, than a fat and prosperous Luxemburger living through four and a half years of a "peace" that was only slavery.

And, if I mistake not, so would Mr. Taft. It is only that he does not see that what he is urging on us calls, in the last analysis, not for the peace of strong freemen ready, able and prepared to fight for their rights, for law and for liberty, but for the peace of slaves, protected perhaps by a supreme committee as long as it can, but powerless to protect their own rights.

I prefer to be a freeman surrounded by possibilities of war, but clothed with that fundamental right of the freeman, guaranteed in profoundest wisdom by the Constitution, the right to bear arms,

to relying on a paper assurance of peace, based on joining with others in giving up our rights to defend our country, our homes and ourselves.

To one other little discussed feature of the league which many, and especially labor union men regard as a great gain, I would call attention; for I believe it a most dangerous feature of the document, the only one carrying something in the nature of a possible sanction back of it, since it invokes the support of organized bodies of men not parties to the league.

I refer to the provision of Article XXIII of the revised covenant that "the members of the league (A) will endeavor to secure and maintain fair and humane conditions of labor for men, women and children, both in their own countries *and in all countries to which their commercial and industrial relations extend,* and for that purpose will establish and maintain *the necessary international organizations.*" The original express provision for "a permanent bureau of labor" has disappeared. But the quoted provisions of the revised covenant and its Articles II and XXIV seem to provide in more general terms for such a bureau.

This clause sounds innocent enough and the objects it claims to support are good. We all believe in securing fair and humane conditions. But what are the means and how will this provision operate? That is another story.

I have before me a recent editorial of the London Times in which it is said triumphantly: "The league must turn labor legislator on pain of jeopardizing the peace which is the object of its exist-

ence. . . . When the convention has been ratified the procedure for enforcing it is fairly elaborate. A committee of inquiry may be appointed and if it finds that a nation is not keeping its engagements the league may offer the defaulting nation the choice of carrying them out or of arbitration before the permanent court of justice; and if both alternatives are refused, then compulsion may be used at the discretion of the league."

"Discretion of the league?" Who exercises it? A little body of irresponsible men. If those men *legislate,* does it not partake rather more of the character of a super-government than some would have us believe? Do we want to set up an autocratic super-government to *legislate* for us, with no check, no limit of power, except only the "discretion" of a few men in Geneva? Who appoints them? How long do they remain in power? Who can oust them? Who can restrain them? No one knows. What check is there on their power? None, but to overturn the league. I personally do not see very much difference between a few autocratic men sitting behind closed doors in Potsdam determining to make war, and a few other autocratic men, sitting behind closed doors in Geneva, determining to use "compulsion" on a great nation.

But what does this article provide for? "The high contracting parties," not the league, but the individual parties, Germany, for instance, when she ultimately becomes a member of the league, "will endeavor to secure and maintain fair and humane conditions of labor . . . both in their own countries

and in all countries to which their commercial and industrial relations extend." Germany's commercial and industrial relations certainly extend to the United States. So Germany is to undertake to come over here and intervene in all local labor disputes, in Connecticut, for instance, which even the United States Government is forbidden to interfere in; and we undertake to let her do so.

Nay, more, in order to render interference more efficacious, "the necessary international organizations" are to be formed and placed under the direction of the League.

This, incidentally, does not forbid individual interference by the "high contracting parties." Do we want this? Especially, do workingmen want this? Will they want it if they understand its full meaning and effect?

I have seen various suggestions that American workingmen will not want it because it might bring standards here down to the level of standards in, for instance, Hungary. There may be some fear of that. Bringing standards together generally does mean bringing down the high standards. But there is a far more serious objection than that, not so easy to see, perhaps, but far more dangerous because of the concealed nature of its operations.

Labor leaders, perhaps, think this is going to give them, in this proposed "international organization," a powerful advocate which may interfere in their favor between the state and its citizens, also in the state's courts, and so give labor men a great special privilege.

Nothing more dangerous to labor men could be devised.

The foundation of all our rights is Equality of Rights before the law. If labor men secure a special privilege of an outside body that may interfere in their behalf in the legislatures, in the courts, have they made a great gain? A thousand times, no!

It is the constant fight of lawyers and judges, who love their country and the liberty and protection to the weak that its laws give, to fight down special privilege whenever and wherever it shows its head. They make that fight because they know that only absolute equality of rights can give protection to the poor, the weak and the helpless. If labor men could establish such a special privilege for themselves (and they cannot so long as this Nation and this State adhere to their most fundamental laws), it might seem that momentarily they made a particular gain. But at what a sacrifice!

Once introduce the principle that equality of rights no longer exists, that there may be special privileges, who are going in the long run to get most of the special privileges? Will it be the weak, the unprotected, those who seek only their own? Or will it be the powerful, those who work behind the protection of secrecy, the covetous, and the grasping? Does it need any answer?

No one is so interested as the small, the weak, and the unprotected, in seeing every effort to attain special privilege defeated, even though it be a special privilege for themselves. Equal protection of the laws is their only safety.

But the labor leaders may say: We

shall be the powerful. We shall hold the special privilege.

If they do, will the laboring men and women have those special privileges, or will it be the leaders who sit in camera; and if they get it will they remain any less selfish, any more scrupulous than other men who attain to power through special privileges? Is the rule of Trotzky and Lenine more beneficent for workingmen than that of the Czar?

Special privilege? That way lies despotism. The whole age-long fight for freedom is always the fight against special privilege.

"Eternal vigilance is the price of liberty." And vigilance means readiness and ability to fight for it.

Peace, if we have to fight for it, is what this country thought when it went into this war. And we fought and we did well to fight. The kind of peace we want, peace with freedom, with law, with justice, cannot be had unless we are always ready and willing and prepared to fight for it if necessary. Peace, of a kind that isn't worth fighting for, isn't worth having.

The United States is founded on the proposition that better than peace is the preservation of the rights of all to "life, liberty and the pursuit of happiness."

The right to maintain these rights is what they ask us to give up that we may have the chance of the will-o'-the-wisp benefits of a paper guaranty of peace, which, when the clash of interests comes, will unquestionably prove to be a scrap of paper.

But they say, it is the only way to

secure these opportunities of lasting peace. That assertion is pure assertion, and, I believe, utterly unfounded. Even if it were true, I, for one, would rather be a free-man, ready, willing and prepared, entitled to fight for myself, my neighbors, my State and my country, than secure permanent peace at the sacrifice of those rights.

But no such alternative is presented. Everything of good that this proposed "League" pretends to offer can be had under real sanctions, without such vague blank-check promises, without such sacrifice of the liberties that have been won and maintained through a thousand years of blood and tears.

How simply, how efficaciously, and with no sacrifice of our liberties, but only with protection to them, more than as much as this League offers may be had, I must ask further opportunity to set out. I can now only say, as the basis on which I would build, that, as in the old story, the shield, which on the one side reads "Liberty," on the other side reads "Enforcement of Law."

III—A "COMMON LAW" OF NATIONS.

April 28th, 1919

Your courtesy has permitted me in my two preceding letters to treat at some length of the two propositions that the proposed League of Nations is a futile thing, a compact without a sanction, which would not give what its promotors hope for, and that nevertheless would involve the United States in great risks and hazards. To-day's dispatches bring the amended "covenant." Though the risks to which the various nations, and especially the United States, would expose themselves, have been in some measure reduced, this has been accomplished by reducing what little efficiency the original document was calculated to have to the vanishing point.

If in 1861 South Carolina could have seceded by giving two years' notice, we doubtless would have had no war from 1861 to 1865, because the Union would not have been worth fighting for. The provisions for unanimous consent recall the history of the ancient Kingdom of Poland, which disappeared from the map of Europe largely owing to a similar provision in its constitution. An agreement to agree on whatever all shall unanimously hereafter agree upon is not a very binding affair.

I come now to my third proposition, that something likely to be much more efficient in securing what we seek for can be had without exposing ourselves to any such risk and hazard of our liberties as the guaranties of even the modified instrument expose us to.

The attainment at one bound of universal peace seems to me an idle dream for this generation. I am seeking no Utopia. Nor am I at all sure that such an Utopia would be wholly good. There are worse things than war. When mankind reaches a stage where no nation will struggle for leadership or supremacy, the nations and peoples will probably have lost in large measure their virility, unless it be through the creation of a single super-nation, which shall include all the world as the Federal Union includes all the States. And for any such super-nation we are not ready, and shall not be till all nations shall reach some reasonable measure of development in self-government.

If international struggles cease to be because there is but one nation comprising the world, there will be internal struggles. Struggles for power will go on, and the rights and determination of freemen to carry arms to defend themselves against the enhanced power of a world-wide government for encroachment on individual liberties and state liberties, will be even more essential than they have proved, through centuries, to guard the rights of English freemen against encroachment by legislative or executive authority.

Now just what is it we wish to accomplish? There have been a good many large-sounding phrases about why we went to war, "to make the world safe for democracy," "for the cause of humanity," etc. They sound well as rhetorical flourishes, but they have no definite or precise meaning.

If I understand the situation aright, what we went into this war for can best

be summed up as the defense and maintenance of unsanctioned international law; law that restrains the greedy, the grasping and the powerful among states from trespassing on the rights of other states and so protects the weaker and the less powerful in their rights. Many people in this country had for months seen how our own safety was menaced by the lawless attacks on others, before the country at large awoke to the fact that all law and the safety and peace of all countries were really attacked by the German plan to advance themselves by predatory war.

When the country finally woke up to the fact that the peace and safety of this nation as well as that of all other nations was attacked, that its rights as a nation were to be disregarded by force, it went into the war for the protection of the common rights of all nations to peace and safety.

We went in to help establish the proposition that the common rights of nations and peoples under which all civilization has grown up could not be disregarded or destroyed by the glorifiers of robbery and of force. And so, not fifteen months later, but the instant the United States declared war, we went to the arbitrament of force without stint or limit, to sustain and maintain those rights, and the so-called law that declared them, applying the ultimate sanction of force.

We now are desirous of making the fruits of that struggle permanent. We wish to establish permanently that lawless attacks on these common rights of nations and peoples must cease, that the generally recognized fundamental

rights of neutrals and belligerents on land and on the seas must be respected, that the recognized so-called laws of war must be followed when war unhappily does come, that lawless wars for gain or power, predatory wars we may call them, shall not recur, that piracy by the servants of a government under its flag, or by a government itself, shall still be "piracy"; that, when wars do come, helpless and unarmed men, women and children shall not be ruthlessly slaughtered or driven away into slavery; that arson, destruction or theft of private property shall still remain crimes, though authorized and approved by a conquering power and done by its order; that prisoners of war shall not be tortured or starved by ruthless barbarians.

If we can put a stop to these things permanently, this war will not have been fought in vain, even though we attain no Utopia; and if the nations can start some new peoples fairly up the toilsome hill of self-government and recognition and protection of individual rights against aggression by the sovereign power, the war will have brought about great good. The proposed league, even as amended, certainly will not do more than this.

Can these things be otherwise accomplished? We want practical results in practical particulars, and we also want a method of bringing about these results that will contain within itself the power of growth, rather than some method where the letter of a treaty or contract will always invite bickerings over what has been agreed, and efforts by contracting parties to restrict to the

letter every obligation they have assumed.

By enforcement of law is the way *intra*-national peace has developed. Should not our efforts toward *inter*national peace be worked out along the lines of the common history of the origins of the different systems of law, whether Anglo-Saxon, Roman, Brehon, Salic, Hebrew or what else?

The growth of every system of law has this characteristic, which to most of us at first seems strange: Remedies come first, and legal rights grow out of the remedies that are afforded and their application.

If any of my legal brethren who do not happen to have made a study of the history of the origins and development of law, wish to see a concrete example of this development in English and American law, I commend to their consideration the history of the growth of all the rights that are redressed solely in Assumpsit, in Trover, and in Actions on the Case, out of the Statute of 13 Edward I, Cap 24, providing in substance that where an original writ exists and in like case requiring like remedy no writ exists, the clerks in Chancery shall devise new writs. It is all a matter of readily accessible history.

Even with our well developed courts, a statute declaring rights, where it provides no remedy, is practically powerless to create such rights. Even the general remedy of refusing to recognize as valid what is forbidden does not go far.

The essential nature of the necessity of providing a remedy to create rights is well illustrated by a story of a New

York promoter, who is said to have been advised by his counsel that he could not proceed with some of his financing plans because they were "against the law." And the promoter answered, "Well, what happens if I do? Do I go to jail?" putting his practical finger unerringly on this vital principle of the enforcible remedy, the "sanction."

All these things we want to put an end to are breaches of what we have improperly called international law; improperly, because it had no force of law, being without any "sanction" save war. So that the chief permanent part of our problem resolves itself into how can we create a "sanction" that will give to public international law the force of law, instead of a mere collection of precepts without any power to enforce back of them, save war.

We have, besides, certain more temporary problems with regard to upholding the new nations now arising out of the chaos, and creating a clear understanding that any renewal by the Central Powers of their assault on civilization will find us willing to support both France and England. So far as is necessary that can be accomplished by temporary treaties; if not, better yet, by a declaration of policy like that of the Monroe Doctrine. Understandings and definite policies based on principles are far stronger than words of a treaty. England was drawn into this war more by her centuries old policy against possession of Belgium by a great continental power, than by the treaty guaranteeing the neutrality of Belgium; and the fundamental blunder of the German Foreign Office was its psychological failure to recognize the strength and

tenacity of purpose that lay back of that policy.

But how can we find a "sanction" for these permanent rules?

Our forefathers found themselves confronted with the same trouble. The original settlement of New England largely grew out of that problem. Where was the "sanction" which could hold Charles I? His word could be pledged, his approval could be given to statutes in the most solemn manner; his lack of right to levy taxes could be asserted by Parliament, and even conceded by him; but back he came extorting "benevolences" and levying "ship-money" by his own unaided royal authority. How could he be bound by a "sanction" which would hold him? Beating him in war did not do it. He went to it again after Naseby and a new war resulted. Finally the solution was found. The High Court was formed. Charles denied in every way he could the jurisdiction of this new tribunal. His denial was rejected. The court, with all the formalities of judicial procedure it could command, tried him for his royal attempts to subvert the English constitution and overturn the laws and liberties of Englishmen. They put their sentence into force and executed him. And from that day it has been the law of England and of the United States that a king or sovereign can do wrong in his sovereign capacity, that if he does he can and, if the case is aggravated enough, will be personally punished for it.

The effect of that putting in force of that principle changed it from a mere precept into law. Not law to be

enforced by the King's courts; for it is a fundamental precept of English law that one may not sit as judge in his own case; consequently not law usually declared there; but nevertheless the fundamental law ready to be invoked by a new High Court or other extraordinary tribunal, should it ever again be necessary to convene one. There came a time, only forty years after the death of Charles I, when a new Stuart King of England thought of challenging that law and attempted to "dispense" with acts of Parliament. But the nation roused itself, and James II, fearing that law, and that it might be again enforced in his own case, fled. And the Great Convention of 1689 again promulgated that law, and, acting as a new High Court, decided that he, too, had "attempted to subvert the constitution of the kingdom" and had "violated the fundamental laws, and having withdrawn himself out of the kingdom had abdicated the government and that the throne had thereby become vacant."

In France like law was established in 1793, and nearly forty years later Charles X fled from France in like fear of the law.

But no such law has ever been established or in force in Germany, and German crowned heads and imperial ministers and great general staff started predatory war and defied all the precepts of Hague conventions, and of the so-called laws of war, convinced, as was Charles I, that they could not be held to any personal responsibility by any tribunal: that there was no "sanction" that could reach them.

Now it is very plain that James II would not have run away in 1688 if the

High Court of 1647 had contented itself with some vigorously worded resolutions about the impropriety of the acts of Charles I. James ran away from a very real danger of which he had a most vivid perception.

As two centuries and a half ago national law could be given a sanction, permanently establishing it, by putting it in force and imposing actual personal punishment for its breach in a single instance, so today international law can be given a sanction by putting it in force and imposing personal punishment for its breach. Let the nations form an International Court to try for these crimes against international law: to define by that decision what international law on these subjects is; to give to such definition the force of law by that court's decreeing the punishment and the nations carrying the sentence into effect.

The accusations of crime would naturally be along the lines of instituting predatory or unprovoked war, of offenses against the law of the seas; of piratical acts; of breaches of the laws of war; of the judicial murder of Fryatt; of the carting of French and Belgians into slavery; of the torture and murder of prisoners; of destruction of private property in conquered territory; of official military authorization of murder and rape.

Would not the definite establishment of international law as binding enforcible law on such points, start a "common law" of nations into being that would, resting on this precedent, grow into an adequate body of law? And would not such a living common law of

nations be better than the dead letter of a treaty?

The trial of questions of fact should be conducted with the utmost protection to the real rights of those accused. But, when convicted, appropriate punishment should be unsparingly inflicted; not as a mere matter of punishment of the guilty, but as a warning to future malefactors.

The law and the facts should be kept as distinct as in any trial in our courts and the law clearly determined. Such a tribunal would thus take the first great step in establishing a "common law" of nations. It would give to maritime law a universality which it has never yet fully possessed, and in so doing would create the real "freedom of the seas" which is only another name for enforcement of the law of the seas. Freedom is not license, but the protection of law. *Your* freedom is simply the restraint of *my* encroachment. The Germans who have called for the freedom of the seas have unconsciously invoked the enforcement of the law of the sea upon themselves. No law of the sea was better established than the one which forbade the sinking of the Lusitania or the torpedoing of the Sussex and all the long list of similar crimes. Let it be settled law that no sovereign government or its ministers can set itself or its navy up against this international law of the seas without incurring and suffering the penalties of so doing. A single enforcement of a "common" international law by an international court and the nations composing it, will take the whole subject of international law out of the domain of mere precept and change it into law.

Let it not be the act of a single nation or of the five great allied nations, but as far as possible, the act of the whole family of nations, establishing law for all.

Let it not be a written law bound by the fetters of words, where "the letter killeth." Let it be like the common law, a matter of principles commanding assent, a body of law having the possibility of growth because it is a live thing and not a dead thing. It is time to codify law only when it has attained its growth, not when it is beginning.

By all means support such a "common law" of nations by treaty pledging the nations to observe, respect and enforce the "common law of nations." Let the treaty, covenant, league, whatever you desire to call it, declare that the nations already recognize certain doctrines and principles as established parts of the international common law; but by no means stunt the possibilities of growth of that common law by making such declarations into limits of its principles.

Then let that international common law be enforced by a court of the nations. The nations are ready to enforce the decrees of such a court in the present case. The cry for justice is going up all over the world, even in Germany. Let every nation that will do so participate in the organization of this court, bringing itself into the family of nations that recognize international law, and have pledged themselves to its enforcement by enforcing it.

Make the law by enforcing it. *Solvitur ambulando.*

Leave the enforcement of interna-

tional law on sovereigns and sovereign powers and their official ministers to this court of nations. Let no single nation try for offenses against itself, sitting as judge in its own case. Bring in, also, the neutrals to sit in the court.

No war minister, no crowned head would hereafter venture lightly on the commission of crimes against a real law of nations backed by such a sanction, with the vivid prospect of personal punishment for such crimes if he failed to overcome all the rest of the world.

The nations committed by participation in such a tribunal and enforcement of its decrees would find themselves steadily more strongly inclined to adhere to the law they themselves had promulgated and enforced.

An added advantage in proceeding before an international court for breaches of international law instead of national laws would be the instant solution of the vexed question of asylum. The right of asylum is, practically, a right not to be surrendered to meet a charge which is a crime under the law of the demanding country, but not a crime under the law of the country of asylum. If the country of asylum belongs to the family of nations, real international law is its own law, just as federal laws are laws of Connecticut. And the ground of claim of right of asylum disappears.

If we need a League of Nations, let it be a league to enforce and maintain an international law founded on justice and to enforce the decrees of its tribunal. But let that league be grounded on principles of law and of justice and not on the letter of contracts or on untram-

meled legislation to be adopted. Those lead to danger and to weakness. The principles of law and of justice back of the Entente were a stronger bond than the terms of the Triple Alliance. And the support of principles of law and justice embodies no such entangling obligations as do the absolute terms of the league that has been proposed to us from Paris. Those principles vary in their application as do the facts to which they apply. If changing circumstances call, for instance, for different boundaries these principles of law and justice would not force us to take the side of injustice and wrong. If some nation were to provoke a war by injustice we would be bound by no covenant to take the side of the wrongdoer. We would not be drawn into every petty raid by Albanian on Greek, or Bulgarian on Servian, or vice versa. Only when the decrees of the court of nations were flouted would the supporting powers be drawn in, and even then only for the one purpose of enforcing the recognized law of nations declared by the court of nations. Provide in the treaty, covenant or league, for the convening of such a court to hear the complaint of any nation believing itself aggrieved. Make it a court to enforce international law and not a legislature.

Such a court might not sit again for many years. Though a branch of it to sit with advisory or even appellate jurisdiction on questions of international law arising in the civil tribunals of different nations might be a most valuable adjunct.

The great thing would be the world-wide recognition of the actual existence of a tribunal which could be called into

session to pass on questions of breaches of recognized international law, and whose decrees could be expected to be enforced by the civilized world; a tribunal of precedents, whose authority would have been recognized and established by one great precedent of punishment, establishing forever the existence of a "sanction" for international law, and for the decrees of the court of nations declaring that law.

I do not claim for any such system that it would at once and of itself create a paradise upon earth, nor that it would bring an end to war. Such Utopian results are not to be looked for. But, that it would make wars of criminal aggression extremely dangerous for the aggressor, so that sovereigns and great ministers would hesitate to start such wars or to conduct them with piracy, with organized rape, with slavery, or with poison gas as adjuncts; so that any recurrence would be highly improbable, with an established law against these things which it was settled could and in case of need would be enforced by personal, and not vicarious, punishment of great ministers and crowned heads; it is obvious. I recognize that murder and highway robbery do still occur despite our criminal law. But I hear no advocates of abolishing the laws forbidding such crimes.

Undoubtedly the jurisdiction of such a court would in time enlarge itself, perhaps by consent of nations involved in controversies with each other, from a jurisdiction dealing only with crimes and tortious acts into one available also in cases of breaches of treaties. Such enlargements of jurisdiction are common to the development of courts. As-

sumpsit, by which we redress implied contracts, developed in this precise way out of trespass on the case, an action to redress torts. Such normal development would naturally tend to steady lessening of wars as means of settling international disputes. And as nation after nation became more accustomed to such determinations and more closely pledged to them by experience, the reign of law between nations, as well as within nations, would grow.

The foundation steps of this proposal can be taken with safety. That taking them would have a most powerful deterrent effect on any sovereigns hereafter contemplating any such efforts to seize world-power as have recently been essayed, is obvious. That the peoples and nations of the earth are today really ready to try the accused for such crimes and, if convicted, punish them, is fairly clear. As to the permanent effect of the calling of such a tribunal into activity, of its adjudication, and of the enforcement of its decrees at this time, there can, it seems to me, be no doubt. Nor does such a court of nations, or such a League of Nations to support its decrees, involve us, like an overgrown "Meddlesome Matty," in every little dispute in the Balkans. It does not bring other nations into any controversies we may have. It bespeaks no hard and fast solution of problems regardless of their merits. It calls for the establishment of right and justice between nations under any and all changing circumstances. It calls for greater and greater recognition of justice and law.

And if it be adopted by that court as a rule of evidence, that starting war

without first applying to the court of nations to hear and settle the dispute, gives rise to a disputable presumption that the one who has been unwilling to submit the dispute to the court of nations is guilty of a lawless, unprovoked and predatory war, the beginning of hostilities, without prior submission to the court of nations, would undoubtedly be studiously avoided.

Fundamentally the proposal is to build up a body of international law with a court and a sanction for its decrees, instead of a treaty creating an untrammeled legislature, without a court and without a sanction.

Hedge the declarations of such a law about, as you will, by requirements of great majorities or even of practical unanimity in the court's definition of recognized international crimes. Every such requirement only gives strength to the decisions attained, and by reflex action makes it a matter of greater difficulty and danger for any nation to read itself out of the society of nations.

But for this generation, and perhaps several generations to come, we should avoid creation of an international legislature, until the limits of its legislative power can be accurately defined, until the world is ready for a super-government—ready, because all the nations will have so far developed the capacity of self-government that they can properly and wisely be admitted to share in legislation.

When that time comes the legislative powers of such a super-government should be even more strictly circumscribed than those of our own Congress, and every restriction that our fathers

threw around the legislative powers of the Union, and every safeguard they built up about the rights of the individual citizen, safeguarding them from infringement by the general government, should be inserted in the fundamental law of the super-state; and not least among them the preservation of that fundamental right of the freeman to carry arms, his right to fight for his own liberties, his own home, his own country against all unlawful aggression of any sovereign power.

What we want to develop is not a world of slaves who cannot fight, but a world of strong freemen bearing arms, who can fight and will fight for law, for justice, for liberty, and against wrong and oppression. Not government resting on the slavishness and weakness of men, but government of the governed, by the governed, for the governed, resting on their strength and readiness to fight for the common rights of all.

I am yours respectfully,

SELDEN BACON.

League for the Preservation of American Independence

(INC.)

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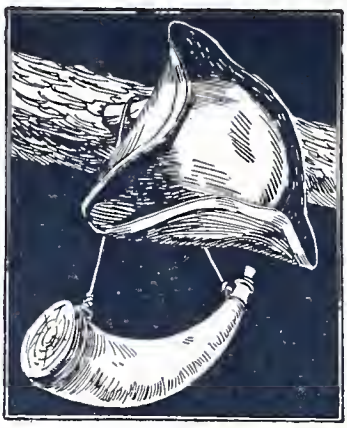

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D-7—5-28-19 2-11-20